IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1347 OF 1992

Greaves Cotton & Company Limited,
a Public Limited Company having its
registered office at 1, Dr.V.B.Gandhi
Marg, Mumbai--400 023. : Petitioner

V/s.

1. State of Maharashtra.
2. The Superintendent of Stamps,
Bombay, having his office at
General Stamp Office,
Bombay--400 023. : Respondents

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Mr.Harinder Toor with Mr.Balakrishnan i/b. M/s.Crawford Bayley & Co., for the petitioner.

Mr.K.R.Belosey, Asstt. Govt. Pleader, for the respondents.

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With

WRIT PETITION NO.1674 OF 1992

Kotak Mahindra Bank Limited,
a Public Limited Company having
its registered office at 36-38A,
Nariman Bhavan, 227, Nariman Point,

Bombay--400 021. : Petitioner

V/s.

1. State of Maharashtra.

2. The Superintendent of Stamps,
Bombay, having his office at
General Stamp Office, Nagar
Bhavan, Fort, Shaheed Bhagat
Singh Road, Bombay--400 023. : Respondents

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Mr.Shyam Mehta with Ms S. Tandon i/b. DSK Legal for the petitioner.

Mr.S.K.Nair, 'A' Panel Counsel, for the respondents.

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CORAM : S.RADHAKRISHNAN &

S.A. BOBDE, JJ.

August 24, 2004.

ORAL JUDGMENT (Per Radhakrishnan,J.)

1. The common point of law raised in both these petitions is whether stamp duty is chargeable on mere allotment of a convertible debenture without an instrument of debenture having been issued therefor, and the only instrument having been issued being a share certificate upon conversion of the debenture.

2. In Writ Petition no.1347 of 1992, the petitioner, Greaves Cotton & Company Ltd., a public limited company,

had made a letter of offer on 12.4.1991 offering 12.5% Secured Fully Convertible Debentures of the face value of Rs.40/- each for cash at par to the equity shareholders and employees of the petitioner. The relevant part of the said letter of offer reads as under:-

> "Each Debenture of Rs.40 will be compulsorily and automatically applied towards the cost of one fully paid Equity Share of the Company of the face value of Rs.10 each at a price of Rs.40 per share (including the premium of Rs.30 per share) without any payment in cash 12 months after the date of allotment of Debentures."
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> "Allotment Letters for the Debentures or Letters of Regret together with Refund Cheques or Pay Orders, if any, will be despatched at the Applicant's sole risk by Registered Post within Six Weeks from the last date stipulated for submission of Application(s) or within such further time as may be extended by the Stock Exchange at Bombay."
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> "The Debenture Certificates will be ready

for delivery within three months from the date of allotment or such other extended time as may be permitted by the Company Law Board, in exchange for allotment letters issued."

It appears that the petitioner-company had received applications for 38,58,029 Fully Convertible Debentures aggregating to Rs.15,43,21,160/- which included the over-subscription amount. Finally, on 1.7.1991 the petitioner-company issued Letters of Allotment for 38,58,029 Fully Convertible Debentures. On 27.9.1991 the petitioner made an application to the Company Law Board for extension of time for issuing Certificates in respect of the Fully Convertible Debentures. On 3.4.1991 the Company Law Board extended the time upto 31.6.1992 for issuing Certificates of Fully Convertible Debentures. On 15.5.1992 the Board of Directors passed a Resolution to issue Equity Share Certificates to allottees of the Fully Convertible Debentures. On the very same date, the petitioner had also made an application to respondent no.2 proposing to pay consolidated stamp duty under section 10 of the Bombay Stamp Act, 1958 (hereinafter referred to as the "said Act") in respect of equity shares to be issued to the allottees of the Fully Convertible Debentures. Accordingly, on the very same date, the petitioner issued

Pay Order in the sum of Rs.15,43,211.60 in favour of respondent no.2 by way of consolidated stamp duty in respect of the Equity Share Certificates to be issued to the allottees of the Fully Convertible Debentures. The aforesaid stamp duty was calculated at the rate of 1% ad valorem under article 17 of Schedule I to the said Act. The petitioner also gave an undertaking not to despatch the Equity Share Certificates until issuance of the Notification under section 10 of the said Act in the Maharashtra Government Gazette.

3. Subsequent thereto on 2.6.1992 the Inspector of Stamp, Bombay, issued a notice to the petitioner demanding an additional stamp duty of Rs.15,43,212/-. The contention of the respondents is that even though the petitioner has paid the entire consolidated stamp duty on the Equity Share Certificates, they are still liable in law to pay the stamp duty on Fully Convertible Debentures.

4. Mr.Toor, learned counsel appearing on behalf of the petitioner, contended that, in fact, till date the company has not issued any Debenture Certificate with regard to the aforesaid Fully Convertible Debentures. The company has issued only Equity Shares and has issued Share Certificates in that behalf and has fully paid the stamp duty with regard to the said Share Certificates. The

contention of Mr.Toor is that though the company had proposed to issue Fully Convertible Debentures which were to be automatically and compulsorily to be converted into Equity Shares, they had, in fact, not issued any Debenture Certificates and, as such, there is no "instrument" whereby the petitioner is liable to pay stamp duty other than the Equity Share Certificates with regard to which the requisite stamp duty has already been paid. Mr.Toor contended that even the provisions of the Companies Act do not contemplate that if an allotment of a Fully Convertible Debenture is made, the company must necessarily issue a Fully Convertible Debenture Certificate. In this behalf, he has referred to the decision of a learned single Judge of this Court (Bharucha,J.) (as His Lordship then was) in Om Prakash Berlia and another v. Unit Trust of India and others [(1983) 54 Com.Cases 469] wherein the learned Judge has categorically held that there is no provision in the Companies Act contemplating that the company must necessarily issue a Fully Convertible Debenture Certificate which argument was rejected categorically.

5. Mr.Toor thereafter brought to our notice the provisions of the Bombay Stamp Act, 1958, especially section 2(d) which defines the word "chargeable" which means, as applied to an instrument, executed or first

executed after the commencement of the said Act, chargeable under the said Act, and as applied to any other instruments, chargeable under the law in force in the State when such instrument was executed or, where several persons executed the instrument at different times, first executed. He also referred to section 2(l) which defines "instrument" which reads under:-

> "instrument" includes every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded, but does not include a bill of exchange, cheque, promissory note, bill of lading, letter of credit, policy of insurance, transfer of share, debenture, proxy and receipt."

6. Mr.Toor then brought to our notice section 3 of the said Act which deals with "instruments chargeable with duty". He also brought to our notice that as per article 17 of Schedule I of the said Act, it should be a certificate or other document evidencing the right or title of the holder thereof, on which the duty is payable.

7. Therefore, the contention of the learned counsel for

the petitioner is that the respondents are not entitled to levy any stamp duty with regard to the transaction and they are entitled to levy stamp duty only on an instrument as the same is very much apparent from the aforesaid provisions of the said Act. In that behalf, Mr.Toor relied upon a decision of the Supreme Court in Narendra Kumar v. Union of India (A.I.R. 1989 S.C. 2138) and especially paragraph 91 of the said judgment wherein it is clearly observed that any instrument which is compulsorily convertible into shares is regarded as an "equity" and not as a loan or debt. Therefore, there is no question of issuing any separate debenture certificate.

8. He also referred to SEBI Guidelines for Disclosure and Investor Protection - Clarification IV, dated 21.9.1992. The relevant portion reads as under:-

> "FCDs/PCDs convertible within 18 months are considered *quasi* equity and, therefore, they are to be treated on par with equity. Long term conversion after 18 months amounts to raising deferred equity. The guidelines also provide for promoters, contribution to the equity to the extent of minimum specified percentage by way of participation in FCDs/PCDs with the same

conversion price as applicable to public."

9. Mr.Toor also referred to a judgment of a learned single Judge of this Court in Life Insurance Corporation of India v. Dinanath Mahadeo Tembhekar and others (1976 Mh.L.J. 369) wherein this Court in paragraph 3 has in no uncertain terms held that the duty is levied on documents and not on transactions. Similarly in paragraph 4 also, the same view has been reiterated. If there is no instrument or document, then there is no question of levy of any stamp duty. Therefore, the contention of the learned counsel for the petitioner is that the duty is leviable only upon an instrument or a document and not on a transaction. On similar lines, even a Full Bench of the Andhra Pradesh High Court in A. Bapiraju and others v. District Registrar, Registration and Stamps, Srikakulam (A.I.R. 1968 A.P. 142) has also held clearly that the duty is liable to be paid on an instrument and not on a transaction. In these circumstances, the learned counsel for the petitioner has strongly contended that the demand raised by the respondents in their letter dated 2.6.1992 demanding Rs.15,43,212/- with regard to the purported Fully Convertible Debentures is totally unsustainable in law, inasmuch as no such Fully Convertible Debenture Certificates had ever been issued by the petitioner-company. In fact, on the expiry of 12 months,

the company had converted the aforesaid Fully Convertible Debentures into shares and had issued the necessary Share Certificates and the petitioner had paid fully the requisite stamp duty payable thereon.

10. Mr.Belosey, learned Asstt. Govt. Pleader, for the respondents referred to the letter of offer which indicates that the company was to issue fully convertible debentures. It is only a letter of offer. The said letter of offer cannot be construed as an instrument. In fact, the letter of offer also makes it abundantly clear that the debenture of Rs.40/- will be compulsorily and automatically applied towards the cost of one fully paid Equity Share. The learned Asstt. Govt. Pleader, thereafter, referred to the letter of allotment with regard to Fully Convertible Debentures. There is no dispute that the requisite stamp duty payable on the said letter of allotment has already been paid. Mr.Belosey sought to contend that the petitioner had planned to issue Fully Convertible Debentures which were to be later on converted into Equity Shares. However, Mr.Belosey could not point out any instrument or a document which can be construed as a Debenture Certificate. In fact, Mr.Belosey fairly conceded that there is no document or instrument issued by the petitioner-company which can be called as a Debenture Certificate.

11. As far as the second Petition, being Writ Petition no.1674 of 1992 is concerned, in this petition, 50% of the Debentures would be converted into equity shares and the remaining 50% would remain as Debentures. In this case, the petitioner-company, Kotak Mahindra Bank Ltd., had issued 14% Secured Partly Convertible Redeemable Debentures of the face value of Rs.90/- each aggregating to Rs.13,95,00,000/- for cash at par. It was clearly stipulated that the payment for the debentures was to be made in two instalments of Rs.45/- each, the first Rs.45/- payable at the time of making the application and the balance Rs.45/- payable on allotment. It was also made clear that part 'A' of each debenture of the value of Rs.45/- was to be automatically and compulsorily converted on allotment into one equity share of Rs.10/- at a premium of Rs.35/-. Part 'B' of each debenture of the value of Rs.45/- was the non-convertible part which was redeemable at par in three instalments at the end of the 7th, 8th and 9th years from the date of allotment. It appears that the petitioner had issued a Debenture Certificates of Rs.45/- each and as far as the convertible part is concerned, separate Share Certificates were duly issued. As far as the Debenture Certificates are concerned, initially, the petitioner had calculated the duty payable at Rs.6,01,594/-. However, respondent no.2, Superintendent

of Stamps, pointed out that the duty payable would be Rs.7,13,000/- and not Rs.6,01,594/-. The difference of Rs.1,11,406/- was demanded by the respondent Superintendent by letter dated 5.2.1992. The petitioner had duly paid the aforesaid amount of Rs.1,11,406/- with regard to the same. There is also no dispute that the petitioner has fully paid the stamp duty with regard to the Share Certificates issued regarding Partly Convertible Debentures and also there is no dispute that as far as the balance Non-Convertible Debenture part is concerned, the same works out to Rs.7,13,000/- which duty was also duly paid. However, the respondents are demanding a sum of Rs.6,23,875/- being the duty payable with regard to the Partly Convertible Debentures. Mr.Mehta, learned counsel for the petitioner, pointed out that as far as the Non-Convertible Debentures are concerned, i.e. part 'B' being the Non-Convertible part of the face value of Rs.45/-, the entire stamp duty of Rs.7,13,000/- has already been paid. As far as the Partly Convertible Debentures of the face value of Rs.45/- each is concerned, the requisite Share Certificates have already been issued and the requisite stamp duty had also been paid. Therefore, Mr.Mehta contended that as far as the Partly Convertible Debentures are concerned, the petitioner-company has not issued any Debenture Certificate in respect of the entire Partly Convertible

Debentures and, therefore, no stamp duty was payable on such Partly Convertible Debentures as no such certificates were ever issued. Under these circumstances, Mr.Mehta contended that the petitioner is liable to pay stamp duty with regard to the Partly Convertible Debentures which automatically stood converted into Equity Shares and requisite stamp duty has already been paid with regard to the said equity shares. He has also made it clear that with regard to separate Partly Convertible Debenture Certificates in respect of part 'A', they have issued the requisite Equity Share Certificates upon conversion of the same and paid the requisite stamp duty thereon. Mr.Mehta drew our attention to the judgment in The Commissioners of Inland Revenue v. G. Angus & Co. (1989 Vol. XXIII Queen's Bench Division 579). The relevant part of the said judgment reads as under:-

> "July 29. LORD ESHER, M.R. In this case the Commissioners of Inland Revenue decided that an ad valorem stamp ought to be attached to the instrument in question. The Divisional Court overruled their decision, and this appeal is brought by the Commissioners.
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> Now, the first thing to be observed is,

that when the legislature assumes to impose a tax on the subject, they must do so in clear and distinct terms; if the matter remains in doubt, the subject is entitled to judgement. Subject to that observation, the question is, whether the instrument which was laid before the Commissioners was a "conveyance on sale" within the meaning of s. 70 of the Stamp Act, 1870. That section says that "the term ‘conveyance on sale’" (a "conveyance on sale" being one of the matters on which duty is imposed in the schedule to the Act, "agreements" being another), "includes every instrument whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser." The first thing to be noticed is, that the thing which is made liable to the duty is an "instrument". If a contract of purchase and sale, or a conveyance by way of purchase and sale, can be, or is, carried out without an instrument, the case is not within the section, and no tax is imposed. It is not the transaction of purchase and sale which is struck at; it is the instrument whereby

> the purchase and sale are effected which is struck at. And if anyone can carry through a purchase and sale without an instrument, then the legislature have not reached that transaction. The next thing is that it is not every instrument which may be brought into being in the course of a transaction of purchase and sale which is struck at. It is the instrument "whereby any property upon the sale thereof is legally or equitably transferred." The taxation is confined to the instrument whereby the property is transferred. The transfer must be made by the instrument. If a transfer requires something more than an instrument to carry it through, then the transaction is not struck at, and the instrument is not struck at because the property is not transferred by it."

Mr.Mehta, therefore, contended that the above judgment makes it abundantly clear that stamp duty is leviable only upon an "instrument" and not on a "transaction".

12. Mr.Mehta, thereafter, pointed out that the Supreme Court has very recently in Hindustan Lever v. State of

Maharashtra [(2004) 9 S.C.C. 438] has referred to the above judgment in paragraph 21, wherein it is categorically held that stamp duty arises only out of an instrument and not otherwise. In that regard, he has referred to paragraphs 21 and 22 of the said judgment which read as under:-

> "21. The case of IRC v. G. Angus & Co. considered as to what interpretation has to be placed upon the expression "conveyance on sale" with regard to Section 70 of the Stamp Act, 1899 and held:
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> > "The term conveyance on sale includes every instrument and every decree or order of any court or of any commissioners, whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser or any other person on his behalf or by his direction."
>
> "22. The Court held that the thing which is made liable to stamp duty is the "instrument". It is not a transaction of purchase and sale, which is struck at, it

> is the "instrument" whereby the purchase and sale are effected which is struck at. It is the "instrument" whereby any property upon the sale thereof is legally or equitably transferred and the taxation is confined only to the instrument whereby the property is transferred. If a contract of purchase or sale or a conveyance by way of purchase and sale, can be, or is, carried out without an instrument, the case would not fall within the section and no tax can be imposed. Taxation is confined to the instrument by which the property is transferred legally and equitably transferred."

Under these circumstances, Mr.Mehta pointed out that the demand made by the respondents for payment of stamp duty on portion of Partly Convertible Debentures which Debentures were never issued by the petitioner, is totally untenable in law.

13. Mr.Nair, learned counsel appearing for the respondents, very strongly referred to the Prospectus issued by the petitioner-company contemplating issuance of Partly Convertible Debentures. However, Mr.Nair fairly

conceded that the Prospectus is only an offer and not an instrument. Mr.Nair also referred to the letter of allotment on which he concedes that the requisite duty has already been paid. Mr.Nair, thereafter, very strongly referred to the Share Certificate issued by the petitioner, a copy of which is at exh.‘F’ to the petition wherein it is mentioned that "The within-mentioned Equity Share(s) are allotted on conversion of Part A of Rs.45 of the Partly Convertible Debentures." Mr.Nair contended that this would indicate that the company has contemplated to issue Partly Convertible Debentures. However, Mr.Nair fairly conceded that the company has actually not issued any Partly Convertible Debenture Certificates. Mr.Nair’s contention is that this indicates the intention of the petitioner-company to issue Partly Convertible Debenture Certificates for which they are liable to pay separate stamp duty, in addition to the stamp duty already paid on the Equity Share Certificates which were converted.

14. Having considered all the submissions of the learned counsel for the petitioners as well as the learned counsel appearing for the respondents in both the above matters, the basic issue involved in the above petitions is that whether the respondent-State could demand stamp duty de hors an instrument and only out of a transaction. After having perused the relevant provisions of law as mentioned

hereinabove, it is abundantly clear that the State of Maharashtra is entitled to levy stamp duty only on the instrument and not on the transaction. It is also clear that there is no law which compels the petitioners to issue a Debenture Certificate before converting the same into an Equity Share. In fact, in that behalf, the very issue was argued before this Court in Om Prakash Berlia's case (supra) wherein this Court has clearly taken the view that there is no mandatory provision in the Companies Act mandating a company to issue a Debenture Certificate before conversion of the same into an Equity Share.

15. The other issue is whether the State is entitled to levy stamp duty on a transaction which is not executed into an instrument. The aforesaid provisions of the Bombay Stamp Act, 1958 as well as the old judgment of the English Court referred to hereinabove and the recent judgment of the Supreme Court in Hindustan Lever's case (supra) make it abundantly clear that the State is entitled to levy stamp duty only on an instrument and not on a transaction. In both the above cases, there is no instrument or a document which can be called as Fully Convertible Debenture Certificate or a Partly Convertible Debenture Certificate and in these circumstances, the demand made by the respondent-State for additional duty with regard to both the aforesaid petitions are totally

unsustainable in law.

16. It is also very pertinent and relevant to note that in both the above petitions, there is no undertaking or promise by either of the petitioners to issue any such Fully Convertible Debenture or Partly Convertible Debenture Certificates. In both the above petitions, the bonds executed by the petitioners stand cancelled. The Prothonotary & Senior Master is directed to return the bonds back to the petitioners.

17. We quash and set aside the aforesaid demand of stamp duty in both the above Petitions and the rule is made absolute in both the petitions accordingly. There shall be no order as to costs.

18. Both the learned counsel appearing for the respondents pray that the operation of this judgment be stayed for a period of eight weeks from today. We stay the effect and operation of this judgment for a period of eight weeks from today.

19. Certified copy expedited.

20. All concerned to act on a copy of this judgment duly authenticated by the Associate of this Court.

Sd/-

S. RADHAKRISHNAN, J.

Sd/-

S.A. BOBDE, J.